1967

State of Utah v. Raymond Dodge : Brief of Appellant

IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

Case No. 10771

RAYMOND DODGE,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the Judgment of the
Second Judicial District Court for Weber County
Hon. Charles G. Cowley, Judge.
66

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STATEMENT OF THE CASE

This is an appeal from a conviction rendered against the defendant for the crime of First Degree Perjury in the Second District Court of Weber County, State of Utah.

DISPOSITION IN THE LOWER COURT

The case was tried by jury before the Honorable Charles G. Cowley, Judge on the 28, 29th days of September 1966. The defendant was sentenced to the indeterminate sentence of NOT LESS THAN ONE OR MORE THAN FIVE YEARS Under the provisions of Utah Code Section 76-45-7 Ann; 1953.

RELIEF SOUGHT ON APPEAL

The defendant seeks a reversal of the Judgment and conviction. And or trial [redacted] de novo.

STATEMENT OF FACTS

In the trial of the substantive charge, the evidence was that defendant [redacted] Raymond Dodge testified at a Habeas Corpus hearing on Dec.10, 1965. That he had been out drinking and someone pointed Bill C. Newbold out as the person who - had sent Tom Danks to prison for Robbing him the defendant Raymond Dodge being curious went over and a asked Bill Newbold what the story was. In the trial of the instant charge the State alleged that no such conversation took place; And as - evidence the State showed whereas Bill Newbold had been in the hospital and operated on for a double hernia on March lo, 1965. The conversation supposedly having taken place on or around March 18, or 19th 1965. The State also produced the testimony of Dr. Keith A. Stratford who testified that it would be highly improbable for Bill Newbold

to have been in a bar drinking. (TR.32)

Dr, Keith A. Stratford then testified on Cross Examination that it was not impossible for Bill Newbold to have been in the bar drinking. - (TR.34) Dr. Stratford further testified he was aware of the fact that Bill Newbold was an --- "Alcoholic." (TR.34-35) Defendant produced the - testimony of Frank Juan Lucero (TR.106-111) Who testified that he knew Bill Newbold had worked with him; and saw Bill Newbold in the bar talking to Raymond Dodge. Also that he was also aware of Bill Newbold's infamous character, and alcholick problem. Defendant produced the testimony of Tom Danks who who testified he introduced defendant to Bill Newbold; Mnd as to Bill Newbold's infamous- character, as a reciever of stoled goods; and as an alcholic. (TR.72-85-119-120) Ray Sheffield also testified as to Newbolds character. (TR.94-104) As did Nelson Cope. (TR.89-92-93.) Defendant then testified in his own behalf. (TR.125-129-140-144). Raymond Dodge defendant here testified that he [illegible] with Bill Newbold. And that he did

in fact talked to Bill Newbold on the date in question, at the Friendly Tavern in Ogden on 25th street.

The State produced the testimony of the wife of Bill Newbold who testified that she was with her husband all the time; and he had not been drinking. How many wifes wouldn't like to help their husband in a case like the one in question?

Then in sentencing defendant Judge Cowley imposed an illegal sentence of from one to five-years, said sentence to run consecutive with the-term of Fifteen Years to Life defendant is presently serving as an habitual criminal. In order for this to be legal the life term would have to be terminated.

ARGUEMENT

POINT 1

THE TRIAL JUDGE ERRED IN NOT INSTRUCTING THE JURY AS TO THE LESS OFFENSE OF SECOND DEGREE PERJURY

Section 77-30-6 Utah Code Annotated 1953 Provides:

The jury may find the defendant fuilty of any offense the commission of which is-- necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense.

In constructing this statute this court has consistently held that when the evidence permits the trial court is under the obligation to instruct the jury with respect to any offenses included in the charged offense. State v. Blyth, 20 Utah 378, 58 Pac. 1108 (1899) State v. Hyams, 64 Utah 285, 230 Pac. 349 (1924); State v. Cobe, 90 Utah 36, 60 P. 2d 960 (1936); State v. Smith, 90 Utah 482, 62 P. 2d 1110 (1936).

> Where therefore, the essentials of the charded greater offense embrace and include every essential of the lesser offense, and where the evidence is sufficient to support the charged greater offense, I think it follows, as does night the day, that of necessity there is also sufficient evidence to support a conviction of the lesser offense. Id at 207, 279 Pat. at 57.

POINT 2

THE STATE FAILED TO PROVE THE INSTANT CRIME BEYOND A REASONABLE DOUBT: FAILING TO PROVE JOINT UNION OF ACT AND INTENT:

Utah Code Ann: Section

POINT 3

TRIAL COUNSEL WAS INCOMPETENT SO FAR AS TO RENDER APPELLANT WITHOUR BENIFIT OF COUNSEL:

ARGUENEMT

Trial counsel Robert L. Lord did not act in the best interest of appellant, and was in fact more of a prosecutor rather than a defense attorney. In that he failed to call-- some witnesses appellant requested. (1), Dennis McCullah who could have established your appellants innocence; was not called. Also during the trial counsel showed little enthusisam. He did not even want to allow your appellant to take the witness stand in his own defense. But after appellant, the prosecutor and Mr. Lord approached the stand and trial counsel indicated that he did not believe in your appellant, he was allowed to take the stand. Why didn't counsel advise appellant of his belief before the trial? In the instant case defendant-appellant was not effectively represented by counsel.

[illegible]

Appellant cites the following cases as authorities in his cause.

State v. Farnsworth, 368 P. 2d 914, Utah (1962);

Mallery v. Mohan, 387 U.S. 1, 84 SUP. Ct. 1489 (1964);

Deprival of counsel in view of fact that trial counsel failed to honestly anc conscientiously represent appellants interests." Is a deprival of due process and equal protection of Bill of Rights, Amendment Fourteen.

POINT 4

THE SENTENCE IMPOSED UPON APPELLANT IS UNLAWFUL IN THAT A SENTENCE OF ONE TO FIVE YEARS CANNOT RUN CONSECUTIVE WITH A TERM OF FIFTEEN YEARS TO LIFE WITHOUT FIRST TERMINATING THE LIFE TERM.

To impose a consecutive sentence on to of a life sentence is more in the line of retribution rather than reformation and constitutes Cruel and unusual punishment. Who is to determine what is life? To impose a consecutive sentence in the instant case is illegal in that a maximum would have

have been set in order for the Court to have the jurisdiction to impose such a sentence. The present term is excessive and not in conformity with the modern goals of criminal furisprudence.

Williams v. People of the State of New York, Supra (1963);

CONCLUSION

Wherefore appellant submits a Trial de novo and or complete Reversal should be granted. His cause is worthy of Plenary Consideration. Further your Affiant Sayeth Not.

Respectfully Submitted,

Raymond Dodge

RAYMOND DODGE in pro se